

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BORIS FIONN INGRAM,

Defendant-Appellant.

UNPUBLISHED

February 17, 2005

No. 251615

Wayne Circuit Court

LC No. 03-005382-01

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions for second-degree murder, MCL 750.317, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second conviction, MCL 750.227b. Defendant was sentenced as a third-offense habitual offender to concurrent sentences of life imprisonment on the second-degree murder conviction, and three to five years on the charge of possession of a firearm by a felon. Defendant was also sentenced to a consecutive prison term of five years on the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in refusing to admit evidence that the victim was involved in illicit drug sales. We disagree. We review a trial court's decision on whether evidence is admissible for an abuse of discretion. *People v Starr*, 457 Mich 490, 491; 577 NW2d 673 (1998). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Additionally, error in the exclusion of evidence will not be a ground for reversal unless the refusal to reverse would not be consistent with substantial justice. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

To be admissible, evidence must be relevant to the case. MRE 402. Relevant evidence is evidence that is material, meaning logically relevant to an issue or fact of consequence at trial, and that has probative value, meaning having any tendency to prove the fact or issue. *Starr*, *supra* at 497-498. All relevant evidence is admissible unless the rules of evidence or other law provide otherwise. *Id.* at 497. However, MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Defendant attempted to introduce evidence that the area where the shooting took place was known for drug sales and that the victim was involved with drugs and drug sales. The trial court concluded that this evidence was not relevant because the shooting did not have anything to do with drugs or drug sales. We agree with the trial court's characterization of the evidence and its well-reasoned conclusion. Defendant, who asserted below that he acted in self-defense, argued that evidence of drug sales was relevant to showing the victim's propensity for violence. However, any relationship between selling drugs and violence is tangential, something defendant admitted at trial. Therefore, we conclude that the court did not abuse its discretion in refusing to admit this evidence.

Defendant also argues that he was denied effective assistance of trial counsel when his attorney did not request that the jury be instructed on imperfect self-defense and voluntary manslaughter. Again, we disagree. Whether a defendant was denied effective assistance involves a mixed question of fact and law. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* We review a trial court's findings of fact for clear error and the constitutional determination de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because no *Ginther*¹ hearing was held, our review is limited to mistakes that are apparent from the lower court record. *Riley, supra* at 139.

To prove a claim of ineffective assistance of counsel, defendant must show that his counsel was "so deficient that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, and that the deficient performance prejudiced the defense to the extent that the defendant was deprived of a fair trial with a reliable result." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Imperfect self-defense will mitigate second-degree murder to voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). An imperfect self-defense is available when a defendant would have been entitled to claim self-defense had the defendant not been the initial aggressor. *Id.* Imperfect self-defense negates the malice required for murder. *Id.*

We conclude that the evidence at trial would not have supported an instruction on imperfect self-defense. Defendant testified that the victim approached him, verbally threatened him, and drew a gun. According to defendant, he drew his gun and shot the victim. This description of the confrontation does not support a finding that defendant was the initial aggressor. Defendant argues that he was the initial aggressor because he swung at another person before the confrontation with the victim took place. However, the incident with the other individual was sufficiently separate from the incident with the victim that aggression toward the other person could not be considered aggression toward the victim. Therefore, because there was no evidence defendant was the aggressor in the shooting, defendant's counsel was not ineffective for not requesting this jury instruction. *Riley, supra* at 142 ("Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion").

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant's assertion that trial counsel should have requested an instruction for voluntary manslaughter as a lesser inferior offense to murder is similarly without merit. A court is to instruct on an inferior offense if it is necessarily included in the greater offense and if a rational view of the evidence supports the instruction. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). "Manslaughter is an inferior offense of murder because manslaughter is a necessarily included lesser offense of murder." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). The element that distinguishes the two crimes is malice. With voluntary manslaughter, the element of malice is negated because the defendant acted while in the heat of passion as a result of provocation. *Id.* at 540.

The evidence below did not support a voluntary manslaughter instruction. Defendant testified that when the victim drew a gun, defendant deliberately drew his gun, ducked, and fired two shots. Thus, defendant's own testimony establishes that he did not act on impulse brought on by an agitated emotional state. Rather, this evidence suggests that defendant acted in response to the danger allegedly posed. Accordingly, defendant's trial counsel was not ineffective for not requesting the court to instruct the jury on voluntary manslaughter. *Riley*, *supra* at 142.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens